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No. 90-1800

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

GRUMMAN AEROSPACE CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

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BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITIONER

With the written consent of the parties,[1] the Chamber of Commerce of the United States (the "Chamber") respectfully submits this brief *amicus curiae* in support of the petition of Grumman Aerospace Corporation ("Grumman") for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit in *United States v. Grumman Aerospace Corp.*, 927 F.2d 575 (Fed. Cir. 1991).

INTEREST OF THE *AMICUS CURIAE*

As the nation's largest federation of business and professional organizations, the Chamber represents over 180,000 companies, many of which provide goods and services to the United States through the federal procurement process. The Chamber routinely represents the interests of these members before the courts, Congress and

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[1] Letters of consent are on file with the Clerk of the Court.

the regulatory agencies on a wide variety of federal procurement issues of national significance.[2]

The question presented to the Court in this case—who may certify a claim under the Contract Disputes Act—critically affects all companies, large and small, that do business with the federal government. On behalf of a large cross section of these companies, the Chamber respectfully submits this brief to apprise the Court of the practical harms wrought by the Federal Circuit in the decision below.

The purpose of the Contract Disputes Act of 1978 (the "Act" or "CDA"), 41 U.S.C. §§ 601-613 (1988), was to establish an expeditious and even-handed system of legal and administrative remedies for government contract claims. S. Rep. No. 1118, 95th Cong., 2d Sess. 1, 4, *reprinted in* 1978 U.S. Code Cong. & Admin. News 5235 (hereinafter cited as "S. Rep."). For contractors, the entry point to this system is the requirement that "the contractor" certify claims over $50,000. 41 U.S.C. § 605 (c) (1).[3] Since the passage of the Act, the government has

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[2] *See Amicus* briefs filed in *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988) (No. 86-492) (military contractor defense), *United States v. Westinghouse Elec. Corp.*, 615 F. Supp. 1163 (W.D. Pa. 1985) (No. 11710), *aff'd*, 788 F.2d 164 (3rd Cir. 1986) (authority to subpoena records), *United States v. Newport News Shipbuilding and Dry Dock Co.*, 655 F. Supp. 1408 (E.D. Va. 1987) (No. 86-182-NN), and *United States v. Newport News Shipbuilding and Dry Dock Co.*, 837 F.2d 162 (4th Cir. 1988) (No. 87-3832) (access to internal audit reports). *See also Defense Contractor Whistleblower Act of 1989*, Comments of the Chamber of Commerce on H.R. 2579, submitted to the House Committee on Armed Services (July 10, 1989); *General Services Administration Proposed Rule on "Procurement Integrity," Federal Acquisition Regulation (FAR) Case 89-23*, Comments of the Chamber of Commerce (Apr. 26, 1989).

[3] Section 605(c)(1) provides in relevant part: "For claims of more than $50,000, the contractor shall certify that the claim is made in good faith, that the supporting data are accurate and complete to the best of his knowledge and belief, and that the amount requested accurately reflects the contract adjustment for which the contractor believes the government is liable."

seized upon this requirement to block contractors at the door, raising interminable questions and challenges over who may certify. Contractors have thus been forced to spend inordinate time and resources litigating a matter which Congress intended to be straightforward. With its decision in *United States v. Grumman Aerospace Corp.*, 927 F.2d 575 (Fed. Cir. 1991), the Federal Circuit now stands four-square in support of this approach, which deprives government contractors of the salutary effect of the statute.

The decision below has had an ambush-like effect on the government contracts industry and threatens the ability of contractors to transact business with the Government on equitable terms and without being subject to quixotic litigation. The Federal Circuit's holding that Petitioner's Senior Vice President and Treasurer did not qualify under the Act to certify a claim denies business realities, and has left contractors mystified as to who, besides a corporate contractor's CEO, may safely certify. The court's holding places at risk government contractors' statutory right to "expeditious and inexpensive resolution of disputes" (*see* 41 U.S.C. § 607(e)), for contractors who guess wrong must re-start the claims resolution process—possibly after years of litigation—and forfeit the statutory interest to which they are entitled.

The Chamber's government contractor members will incur substantial financial loss and will be deterred from doing business with the Government if *Grumman* remains the law. In light of its strong interest in the outcome of this case, the Chamber urges this Court to grant Grumman's petition for review.

STATEMENT OF THE CASE

This case arises out of the Federal Circuit's determination that a senior corporate officer who was "among the most knowledgeable and responsible in assessing . . . a claim"[4] was not qualified to certify that claim on be-

[4] *Grumman*, 927 F.2d at 583 (Plager, J., dissenting).

half of the corporation under the CDA. Specifically, the court held that the officer who served as 1) Treasurer of Grumman Aerospace Corporation, and 2) Senior Vice President Finance of the Aircraft Systems Division of the parent Grumman Corporation, and who 3) exercised overall responsibility for Grumman's financial affairs[5] was not qualified to certify a claim relating to employee compensation costs.

The court premised its conclusion on an interpretation of a regulation issued by the Office of Federal Procurement Policy ("OFPP") which purports to implement the certification requirement of the CDA. That regulation, Federal Acquisition Regulation (FAR) § 33.207(c)(2),[6] provides:

> If the contractor is not an individual, the certification shall be executed by—
>
> (i) A senior company official in charge at the contractor's plant or location involved; or
>
> (ii) An officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs.

With respect to the first prong of the regulation, the court required that a certifier must (a) have primary responsibility for executing the contract, (b) be physically present at the location of primary contract activity, and (c) not report to *anyone*, especially with regard to the filing of the claim. *Grumman*, 927 F.2d at 580. Although the court found that Grumman's Senior Vice President and Treasurer was a senior company official, it concluded that he did not qualify under § 33.207(c)(2)(i) because he reported to another officer within Grumman's organization and because there was no evidence that he was physically present at the site of contract performance.

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[5] *Grumman Aerospace Corp.*, ASBCA No. 34665, 90-1 BCA ¶ 22,417 at 112,601 (1989).

[6] 48 C.F.R. § 33.207(c)(2) (1990).

The court below further concluded that Grumman's certifier did not have overall responsibility for the contractor's affairs under § 33.207(c)(2)(ii) because he was only responsible for Grumman's financial affairs. *Id.* Thus, over strong dissent, the court dismissed Grumman's claim, forcing Grumman to re-start a claims resolution process that had lasted nearly five years to the date of the Federal Circuit's decision and to forfeit its statutory interest. The court recognized that the purpose of the CDA certification requirement is to discourage the submission of unwarranted claims (*see id.* at 579), but did not suggest that permitting Grumman's Senior Vice President and Treasurer to certify would have defeated this purpose.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION OF WHO MAY CERTIFY A CLAIM HAS SPAWNED MORE THAN A DECADE OF WASTEFUL LITIGATION, CONTRARY TO CONGRESS' INTENT.

The purpose of the CDA was to establish a fair, equitable and efficient system for the resolution of government contract disputes. S. Rep. at 1, 4. Congress sought to eliminate "executive branch fiat"; to "broaden[] the scope of remedies available to the contractor"; and to tear down "artificial" barriers which could defeat contractor claims. *Id.* at 2, 12, 19. A more expeditious process was essential in Congress' view because "[t]he way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for Government contract business." *Id.* at 4. To this end, the Act requires that an agency board provide "expeditious and inexpensive resolution of disputes." 41 U.S.C. § 607(e).

Consistent with these purposes, Congress was concerned that the submission of unwarranted claims "protracts disputes and clouds the true issue in a case." S. Rep. at 7. Certification was intended to deter the submission of unwarranted claims. *Grumman*, 927 F.2d at 579. Thus,

in the context of Congress' overall scheme, certification served as an expedient—not an obstacle—to the resolution of claims. Congress surely did not intend through the certification requirement to retract the benefits of equity and efficiency that the Act as a whole was meant to confer. *See Triax Co. v. United States*, 20 Cl. Ct. 507, 512 n.5 (1990) (interpreting CDA certification requirement with view toward "avowed purpose of the Contract Disputes Act . . . to foster the prompt, efficient resolution of disputes between contractors and the government"). *See also Bob Jones University v. United States*, 461 U.S. 574, 586 (1983) (particular clause of a statute must be interpreted in light of the whole statute and in view of Congress' policy concerns).

Indeed, in 1984 congressional hearings on the CDA, the Department of Justice ("DOJ") and the Department of Defense ("DOD") strongly defended the certification requirement as being essential to the efficient and expeditious resolution of government contract claims. These agencies argued that certification eliminated "gamesmanship" and "posturing" from the claims process; prevented a "guessing-game"; and promoted "more timely" and "swifter" resolution of contract disputes. *See Contract Disputes Act of 1978: Hearings Before the H. Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary on H.R. 3668*, 98th Cong., 2d Sess. 134, 161, 173, 218 (1984) (hereinafter cited as "*1984 Hearings*"). The DOJ and DOD assured Congress, moreover, that substantial certification-related litigation was "largely behind us." *Id.* at 134, 227.

The agencies did not give enough credit to the creativity of their own lawyers. For the past 12 years, claims certication has engendered exactly the protracted, superfluous litigation Congress sought to avoid. The vehicle for this abuse has not been the CDA—which permits "the contractor" to designate who will speak for it—but the regulation which purports to implement the statute, FAR § 33.207(c)(2). Agencies have seized on the regulation

to erect preliminary obstacles to contractor claims.[7] The focus of this litigation has not been whether claims were inflated or unwarranted, as was Congress' concern. Rather, the cases evidence a byzantine process of second-guessing over who should sign for the company.

This kind of bureaucratic "gamesmanship" is the antithesis of the fair and efficient dispute resolution system which Congress intended to establish and which the Executive branch, in 1984, assured Congress certification would promote. Moreover, this litigation sideshow disregards Congress' concern in enacting the CDA that "the Government has limited resources that can be devoted to the resolution of claims disputes." S. Rep. at 8.

Congress could not have expected nor intended that the straightforward certification requirement it enacted would become a source of collateral litigation having

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[7] *See, e.g., Triax Co. v. United States*, 20 Cl. Ct. at 513 (Government argued that *all* management-level personnel should sign off on a certified claim, which would ensure that at least one signatory would be the proper individual); *Western Empire Constructors, Inc. v. United States*, 20 Cl. Ct. 668, 671 (1990) (Despite the fact that its interpretation would render the two parts of the regulation indistinguishable, government argued that under section (i) of the regulation, the certifier must be either an equity owner, director, or officer of the contracting entity); *Sun Cal, Inc. v. United States*, 21 Cl. Ct. 31, 34 (1990) (Although contractor's President validly delegated authority to Vice President pursuant to by-laws, government argued that Vice President could not certify claim as an officer having overall responsibility for contractor's affairs); *McDonnell Aircraft Co.*, ASBCA No. 37346, 89-2 BCA ¶ 21,820 (1989) (Government, without evidentiary support, contended that Vice President and Controller of the contractor was not an officer having overall responsibility for contractor's affairs and thus could not certify a claim under FAR § 33.207(c)(2)(ii)); *Tracor, Inc.*, ASBCA No. 29912, 87-2 BCA ¶ 19,808 (198[illegible] (Government argued that Tracor's Director of Contracts could not properly certify claim); *Peabody N.E., Inc.*, ASBCA No. 26410, 83-2 BCA ¶ 16,552 (1983) (Government, under Department of Defense provision identical to FAR § 33.307(c)(2)(i), unsuccessfully argued that certification by the *Presidents* of the contractor *and* subcontractor did not constitute certification by authorized individuals).

nothing to do with the requirement's objective of preventing unwarranted claims. The Federal Circuit's decision in *Grumman* is a zenith in this process. This Court's intervention is necessary to restore the fair and efficient system Congress intended to create. Twelve years of mindless litigation is enough.

II. THE FEDERAL CIRCUIT DECISION IMPOSES UNDUE RISKS AND BURDENS ON CONTRACTORS, AND FIRMLY ESTABLISHES CERTIFICATION AS AN OBSTACLE, RATHER THAN AN EXPEDIENT, TO CLAIMS RESOLUTION.

A. The Court Has Imposed A Restrictive And Unworkable Rule Which Is Divorced From The Realities Of Corporate Organization And Government Contracting.

Despite the extremes to which agencies have gone to get claims dismissed on certification grounds, the pre-*Grumman* case law generally adopted a reasonable approach. Consistent with the CDA's requirement that the "contractor" certify, the cases permitted certification by a broad class of persons who could be deemed to speak for the contractor. Thus, the determination of whether a certifying individual was "a senior company official" within the meaning of FAR § 33.207(c)(2)(i) was based largely on the individual's authority to certify the claim. *See, e.g., M.A. Mortenson Co.*, ASBCA No. 39978, 91-1 BCA ¶ 23,558 (1990) (certification valid where certifier was authorized to, and did, execute modifications to the contract); *Al Johnson Constr. Co. v. United States*, 19 Cl. Ct. 732, 738 (1990) (finding certification invalid because certifying individual was not authorized to make the certification); *Manning Elec. & Repair Co. v. United States*, 22 Cl. Ct. 240, 244 (1991) (claim properly certified where project manager had "full contract authority to bind the company").

Similarly, with regard to § 33.207(c)(2)(ii), the boards and Claims Court held that a contractor's cor-

porate officers presumptively have overall responsibility for the contractor's affairs. *See, e.g., Triax Co.*, 20 Cl. Ct. at 511. *See also McDonnell Aircraft Co.*, 89-2 BCA ¶ 21,820 (Vice President and Controller of the contractor held to be an officer with overall responsibility for contractor's affairs).[8]

The Federal Circuit's decision in *Grumman* departs dramatically from this reasonable approach, adopting instead a restrictive interpretation of FAR § 33.207(c)(2) that does not comport with the myriad ways companies may be organized or contracts administered.

1. *There May Be No Appropriate "Senior Company Official" to Certify under the Federal Circuit's Interpretation of FAR § 33.207(c)(2)(i).*

Under the Federal Circuit's construction of § 33.207 (c)(2)(i), the certifying "senior company official in charge" at the plant or location involved must (a) have primary responsibility for executing the contract, (b) be physically present at the location of primary contract activity, and (c) not report to anyone, in particular with regard to the filing of the claim. 927 F.2d at 580. The court's equation of "in charge" with not reporting to anyone restricts certification to whomever is in overall operational command of the relevant facility. The difficulties with the court's interpretation are manifold.

A contractor, for example, may be organized into several different divisions, with each division performing under a number of contracts. Each division, further, may have facilities at several sites.[9] The only person who is

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[8] Indeed, some courts, recognizing that certification is not an end in itself but is instead a check on inflated claims, held that where there is no showing that a contractor is attempting to escape potential liability, strict compliance with the certification regulation is unnecessary. *Cox Constr. Co. v. United States*, 21 Cl. Ct. 98, 102 (1990).

[9] *See, e.g.*, SEC Form 10-K of General Dynamics Corp. for the year ended December 31, 1990, pp. 1-12.

"in charge" of a division's facility in the sense of not reporting to anyone is the manager or executive who oversees the division. (Even that person, of course, would report further up the corporate ladder.) The division manager, however, could not be located at all of the facilities, and may not be located at any of them. *See, e.g., R.J. Lanthier Co.*, ASBCA No. 41350, 91-2 BCA ¶ 23,917 (1991) (contractor's Operations Manager, although "a senior company official" with "responsibility for *all* . . . field office operations", was located in contractor's home office rather than the field office set up to execute the contract) (emphasis supplied). Further, the division manager would likely have broad managerial responsibilities, and would not have "primary responsibility" for executing any single contract.

Conversely, the person "in charge" at the relevant facility may not qualify as a "senior company official." *See M.A. Mortenson Co.*, 91-1 BCA ¶ 23,558 (citing cases to illustrate the confusion among the boards and within the Claims Court as to whether on-site Project Managers are senior company officials). Even if a person on site is "in charge" and qualifies as a senior company official, he may not have "primary responsibility for execution of the contract." That role may fall to a program manager, contracts representative, or director of contracts who may, of course, "report to" the executive in charge of the facility.

The question of what is the site of "primary contract activity" has its own special problems. For instance, the site of primary contract activity is unclear where the contractor certifies its claim after demobilizing its workforce at the location where the contract was executed. *See, e.g., Triax Co.*, 20 Cl. Ct. at 512 n.6 (suggesting that when the contractor demobilizes its work force prior to certification, its home office may be considered the "location involved").

Moreover, the administration of government contracts may take almost unlimited forms. It may be unclear which of a number of sites performing under a contract would be considered the site of "primary contract activity." For example, which is the site of "primary activity" when one facility negotiates a contract, signs it, and performs all assembly and shipment to the customer, but a different facility manufactures 90% of the parts? If a contract is for development work, is the site of "primary activity" the laboratories where the computer models are generated, or the test range where the prototype is tested? These types of questions are not susceptible to clear-cut answers. Yet, under the Federal Circuit's approach, the contractor must find the *one* "right" official to certify a claim.

The Federal Circuit's interpretation of the first prong of the regulation thus assumes that a contract is performed at one facility which is headed by a qualified senior official who has direct knowledge of and responsibility for the contract. By superimposing this restrictive paradigm on the multifarious corporate structures of government contractors, the court has engendered more confusion than clarity. In deciding who should certify a claim, contractors are forced to play a guessing-game where, as described below, the penalty for guessing wrong can be dismissal and loss of interest after years of litigation.

2. *Contractors Must Start the Process All Over Again If the "Wrong" Official Certifies.*

Because the Federal Circuit has held the Act's certification requirement to be jurisdictional, once a claim is found to be improperly certified, all proceedings concerning that claim are nullified and the contractor must begin the claims process again. *Ball, Ball & Brosamer, Inc. v. United States*, 878 F.2d 1426, 1428 (Fed. Cir. 1989); *W.M. Schlosser Co. v. United States*, 705 F.2d 1336, 1338 (Fed. Cir. 1983). Viewed as a question of subject mat-

ter jurisdiction, improper certification can be raised at any time. *Grumman*, 927 F.2d at 580. The contractor is thus placed at enormous risk because its claim can be dismissed after years of expensive and time-consuming litigation.[10]

The potential for abuse in this process is manifest. The government can delay payment of valid claims interminably by ambushing the contractor with an improper certification argument at the end of lengthy proceedings and, if successful, force the contractor to start all over again. This turns the CDA on its head, establishing a carousel of litigation rather than the fair and efficient system which Congress intended.

Further, because the Federal Circuit has held that no interest begins to accrue until a claim is properly certified,[11] forcing the contractor to start the dispute resolution process anew deprives the contractor of the statutory interest to which it is entitled under the Act.[12] This effect is particularly ironic in light of Congress' expectation that the allowance of interest would provide inducement to *expedite* final disposition of claims. *See Brook-*

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[10] *See, e.g., Grumman*, 927 F.2d 577 (claim filed in 1987 and dismissed more than four years later, after board proceeding and appeal, because purportedly signed by wrong official); *Ingalls Shipbuilding, Inc.*, ASBCA No. 38323, 91-2 BCA ¶ 23,904 (1991) (claims certified in July of 1987, but government did not challenge certification until 1989; claims dismissed in 1991); *Reliance Insurance Co. v. United States*, 23 Cl. Ct. 108 (1991) (certification in April of 1986; government did not challenge certification until 1990; claim dismissed in 1991).

[11] *Fidelity Constr. Co. v. United States*, 700 F.2d 1379, 1384 (Fed. Cir.), *cert. denied*, 464 U.S. 826 (1983).

[12] "Interest on amounts found due contractors on claims shall be paid to the contractor from the date the contracting officer receives the claim pursuant to section 605(a) of this title from the contractor until payment thereof." 41 U.S.C. § 611.

field Constr. Co. v. United States, 661 F.2d 159, 164-65 (Cl. Ct. 1981).

3. *The Federal Circuit's Requirement that the CEO or Its Equivalent Certify under FAR § 33.207 (c)(2)(ii) Is Unreasonable and Contrary to the Purposes of the CDA.*

If contractors wish to avoid "guessing" who is the correct "senior company official" under the Federal Circuit rule, they must resort to FAR § 33.207(c)(2)(ii), which provides for certification by "[a]n officer or general partner of the contractor having overall responsibility for the conduct of the contractor's affairs." The Federal Circuit found that Grumman's Senior Vice President and Treasurer was not such an officer because he was responsible for only the contractor's financial affairs. 927 F.2d at 580-81. Thus, "[a]fter *Grumman* . . . [only the] chief executive officer, or one of equivalent status," will satisfy the second prong of the regulation. *KDH Corp. v. United States*, 23 Cl. Ct. 34, 42 (1991).[13] For a number of reasons, this approach is unworkable and at odds with the CDA.

First, the Federal Circuit's interpretation requires certification by an individual who is unlikely to have first-hand knowledge of the claim. The result is a *lessening* of corporate responsibility for the contents of claims, a consequence contrary to what Congress intended.

Second, and relatedly, CDA certifications have often provided the basis for civil and criminal actions against

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[13] The Federal Circuit denied that it required certification by the CEO on the grounds that the correct "senior company official" could also certify under the first prong of the regulation. 927 F.2d at 581. The court's analysis made clear, however, that, under the second prong of the regulation, only a CEO, or its equivalent, may certify.

government contractors.[14] Certifications are especially important to criminal prosecutions because they help establish a statement, individual responsibility for that statement, and intent.[15] In an era of increasing criminalization of the procurement process,[16] it is unreasonable and unfair to require certification by officers who do not have direct knowledge of a claim.

Third, a "CEO or equivalent" rule imposes an unwarranted administrative burden on contractors. For companies with numerous contracts and disputes, the rule requires an officer at the highest level to take large amounts of time away from running the company in order to study potential claims in depth and be in a position to sign a certification. There is no basis in the CDA or in logic for a rule which prevents reasonable delegations of authority consistent with the contractor's by-laws or other governing provisions.

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[14] *See 1984 Hearings* at 217.

[15] *Id.* at 218.

[16] *See Integrity of Department of Defense Acquisition System and Its Impact on U.S. National Security: Hearings Before the Full Comm. and the Acquisition Policy Panel, Comm. on Armed Services,* 100th Cong., 2d Sess. 19 (1988) (testimony of R. James Woolsey, member, Packard Commission) (noting increased number of criminal prosecutions of government contractors); *Gov't Prosecuting Fraud Cases Based on Conduct Once Viewed as 'Noncriminal'*, 44 Fed. Cont. Rep. (BNA) 536 (Sept. 16, 1985) (reporting remarks by then United States Attorney for the Eastern District of Virgina); *DOD Fraud Investigations: Characteristics, Sanctions, and Prevention,* GAO Report No. B-224759, pp. 3-4 (Jan. 20, 1988) (reporting that DOD investigators more than doubled the number of procurement fraud investigations between 1983 and 1986); Shirk, Greenberg & Dawson, *Truth or Consequences: Expanding Civil and Criminal Liability for the Defective Pricing of Government Contracts,* 37 Cath. U.L. Rev. 935 (1988) (discussing "the vulnerability of government contractors to the web of civil and criminal liability for defective pricing and [the] significantly expanded . . . scope of that liability").

B. The Court's Decision Places A Special Burden On The Large Number Of Small To Moderate-Sized Companies Which Sell To The Government.

Small businesses account for a substantial portion of the products and services supplied to the Government each year.[17] The legislative history of the CDA reveals that Congress was concerned that small businesses were deterred from doing business with the Government for fear that if a dispute arose their remedy would be cumbersome and expensive.[18]

Yet the Federal Circuit's ruling falls perhaps most harshly on small contractors. As the dissent in *Grumman* observed:

> The Government's position . . . sets a trap for the unwary, requiring that claims falling short of its technical trap be re-started, thus giving the Government more years to avoid paying its just debts, if they are ultimately found to be just, and to deny the contractor the interest on the money due that the statute requires be paid.
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> * * * *
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> *It is the small companies who seldom do business with the Government and who can least afford delayed payments with no interest paid for the delay, who likely will be caught and most hurt by this construction of the regulation.* This court should not countenance any such distortion of the remedial purposes of the Contract Dispute Act.

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[17] Generally, in the area of government contracts, a business is considered small if it has less than 500 employees. *The State of Small Business: A Report of the President Transmitted to the Congress 1990*, p. 188 n.1 (GPO publ. 1990). In Fiscal Year 1988, small businesses provided approximately one-third of the $194.9 billion in goods and services contracted for by the Government. *Id.* at 187-88.

[18] *See Contract Disputes: Hearings Before the H. Subcomm. on Administrative Law and Governmental Relations of the Comm. on the Judiciary on H.R. 664 and Related Bills*, 95th Cong., 1st Sess. 68 (1977) (comments of Congressman Kindness on H.R. 3745).

927 F.2d at 583 (Plager, J., dissenting) (emphasis added).

C. The Court's Decision Unfairly Penalizes Contractors Who Certified Claims According To Pre-Existing Legal Requirements.

The effects of the *Grumman* decision are neither hypothetical nor overstated. In light of *Grumman*, the Armed Services Board of Contract Appeals has begun a comprehensive review of pending cases to determine if dismissals for improper certification are required. *See ASBCA Asks Selected Contractors to Address Adequacy of Certifications*, 55 Fed. Cont. Rep. (BNA) 369-70 (Mar. 25, 1991). At least seven cases have already been dismissed, many of them after years of litigation.[19]

The cases applying *Grumman* have already demonstrated the irrational results that flow from the Federal Circuit's decision. For example:

- In *Reliance Insurance Co. v. United States*, 23 Cl. Ct. 108 (1991), an Assistant Vice President's certification was held improper although he was specifically authorized by the company to initiate prosecution of contract claims and to pay or compromise claims, and notwithstanding that his authority in connection with claims arising out of his region had no upper dollar limit.
- In *R.J. Lanthier Co.*, ASBCA No. 41350, 91-2 BCA ¶ 23,917 (1991), the certifying individual, appellant's Operations Manager, was responsible for all home office and field office operations and reported directly to the President. Because the certifier was

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[19] *See Reliance Insurance Co. v. United States*, 23 Cl. Ct. 108 (1991); *Newport News Shipbuilding and Dry Dock Co.*, ASBCA No. 33244, 91-2 BCA ¶ 23,865 (1991); *Ingalls Shipbuilding, Inc.*, ASBCA No. 38323, 91-2 BCA ¶ 23,904 (1991); *R.J. Lanthier Co.*, ASBCA No. 41350, 91-2 BCA ¶ 23,917 (1991); *PCL Civil Constructors, Inc.*, ASBCA No. 41881, 91-2 BCA ¶ 23,906 (1991); *Northwest Marine, Inc.*, ASBCA No. 41702 (May 3, 1991) (Westlaw, FGC-BCA library); *Prism Constr. Co.*, ASBCA No. 42096 (May 21, 1991) (Lexis, PUBCON library).

not physically present at the contractor's *ad hoc* field office, however, his certification was held improper and the contractor's claim was dismissed.

- In *Northwest Marine, Inc.*, ASBCA No. 41702 (May 3, 1991) (Westlaw, FGC-BCA library), the Board held that a contractor's Vice President and General Manager could not certify, notwithstanding that he 1) was a senior company official, 2) had a physical presence at the job site, and 3) possessed "unlimited authority" to bind the contractor, because the company's President was also actively involved in the project at issue.

The *Grumman* decision has thus injected chaos into a critical portion of the procurement process where Congress intended to create equity, efficiency, and balance. Where regulations have been applied so as to eviscerate the intent of the very statutes on which they are based, this Court has appropriately stepped in to restore the intent of Congress. *See, e.g., Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp.*, 474 U.S. 361, 368 (1986).

III. THE FEDERAL CIRCUIT DECISION CREATES STRONG DISINCENTIVES TO DOING BUSINESS WITH THE GOVERNMENT, CONTRARY TO CONGRESS' INTENT.

A major purpose of the CDA was to encourage companies to compete for government business. The Federal Circuit decision has exactly the opposite effect.

A company which chooses to sell to the government already must find its way through a broad spectrum of statutory and regulatory obstacles. Acquisition regulations comprise seven volumes in the Code of Federal Regulations. Government contractors assume numerous burdens not encountered in the commercial sector. For example:

- Subject to certain exceptions and threshold requirements, on all contracts other than those using sealed-

bid procedures, contractors must provide the government with data supporting the costs that are anticipated in the contract, and the price proposed. This requirement is stated in terms of the contractor's obligation to disclose all "cost or pricing data"—*i.e.*, "all facts that, as of the date of agreement on the price of a contract . . . a prudent buyer or seller would reasonably expect to affect price negotiations significantly." 10 U.S.C. 2306a(g) (1988); *see also* 41 U.S.C. § 254 (1988); FAR § 15.804.

- Contractors are subject to extensive and often overlapping audit requirements. Contracting agencies perform audits with regard to contract costs claimed or incurred and cost or pricing data submitted. *See* FAR §§ 52.214-26, 52.215-2. Agency Inspectors General audit contractors pursuant to their overall authority to audit agency operations and programs. *See* 5 U.S.C. App. §§ 1-12 (1988). The standard "Examination of Records by the Comptroller General" clause grants the General Accounting Office audit rights over negotiated contracts in excess of $10,000. FAR § 52.215-1.

- Regulations require the insertion in government contracts of voluminous standard clauses, many subject to particular interpretations developed through years of regulatory and case law evolution. *See* FAR Part 52.

- As noted above, government contractors are increasingly subject to civil and criminal sanctions. In the commercial sector, a contract dispute is a contract dispute. For government contractors, however, the prospect of criminal prosecution and treble damages for civil fraud (31 U.S.C. § 3729 (1988)) always lies just over the horizon.

While companies whose products can only be used by the government (*e.g.*, military hardware) may be captives of this system, providers of commercial products and serv-

ices are not. Thus, Congress, determined to encourage more commercial companies to sell to the government, recently enacted legislation requiring that the Department of Defense develop simplified contracts for commercial products and that cost or pricing data requirements be reduced.[20]

The CDA was similarly intended to effect a departure from the unusual burdens visited upon government contractors. Congress hoped to encourage companies to do business with the government by providing a "fair, balanced," "equitable," and "efficient" dispute resolution system. S. Rep. at 1, 4. Such a system was necessary, Congress found, because "[t]he way potential contractors view the disputes-resolving system influences how, whether, and at what prices they compete for Government contract business." *Id.* at 4.

In the hands of the agencies and the Federal Circuit, however, the portal to this system—the certification requirement—has become yet another arcane and burdensome rule imposed on contractors. Certification under the terms of the OFPP regulation is now an obstacle to claims resolution. This can only further discourage companies from competing for government business, a result at odds with what Congress intended when it enacted the CDA, and still intends today.

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[20] *See* Pub. L. No. 01-189, § 824, 103 Stat. 1504, *reprinted in* 1989 U.S. Code Cong. & Admin. News; 10 U.S.C.A. § 2325 note (West Supp. 1984-1990); H.R. Rep. No. 331, 101st Cong., 1st Sess. 612-13, *reprinted in* 1989 U.S. Code Cong. & Admin. News 977, 1069-70; S. Rep. No. 81, 101st Cong., 1st Sess. 194-97 (1989).

CONCLUSION

For all of the foregoing reasons, the Chamber urges that the writ sought by Grumman's petition be granted.

Respectfully submitted,

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